1963

Pearl A. Long v. Industrial Commission of Utah et al : Defendants' Brief

Utah Supreme Court

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Leon A. Halgren; Attorney for Plaintiff;

IN THE SUPREME COURT OF THE STATE OF UTAH

PEARL A. LONG, wife of WILLIAM T. LONG, deceased,
Plaintiff,

vs.

THE INDUSTRIAL COMMISSION OF UTAH, WESTERN STATES REFINING COMPANY and THE STATE INSURANCE FUND,
Defendants.

Case No. 9867

DEFENDANTS' BRIEF

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STATEMENT OF FACTS

We agree with the first two paragraphs of the Statement of Facts found at page 6 of Plaintiff's Brief. But we do not agree with the third paragraph.

Mr. Long did leave Moab, Utah about 5:00 A.M. on November 26, 1960, driving his employer's truck, his destination being Farmington, New Mexico; and he did not get any further than Cahone, Colorado, as stated in Plaintiff's Brief. But Plaintiff's Brief contains the statement that Mr. Long had an accidental injury while changing a tire on the truck, somewhere between Moab,

Utah and Cahone, Colorado. Basically one of the main points of conflict between the parties in this case is whether or not there was any such accident.

In her application filed with the Industrial Commission on April 12, 1961, the applicant claimed that her husband received an injury on Nov. 26, 1960, "while lifting spare tire in rack on trailer after changing flat tire on equipment." (R. 2). Most of the evidence presented by the parties at the Industrial Commission's hearing on October 16, 1961, related to that point.

There was no question about the fact that Mr. Long was in the course of his employment on November 26, 1960 from 5:00 A. M. until he became sick about three hours later near Cahone, Colrado. Therefore, the only substantial question involved in the Industrial Commission's hearing on October 16, 1961, was whether he had an accidental injury during that three hour period. It is the contention of the Defendants that he did not have any such accident.

ARGUMENT

POINT 1. THE INDUSTRIAL COMMISSION'S DECISION DENYING APPLICANT'S CLAIM FOR COMPENSATION BENEFITS, WAS LEGAL AND PROPER.

The record does not show what time of day Mrs. Long first saw her husband in the hospital at Cortez, Colorado, but it was sometime in the afternoon of November 26, 1960, because she had to drive from Moab, Utah

to Cortez after she received the telephone call about 10:30 A. M., notifying her that Mr. Long was in the hospital in Cortez.

Even if Mrs. Long's testimony that her husband made certain statements to her in the hospital at Cortez, (R. 22-26), were considered to be in the category of res gestae, the Referee and Industrial Commission were still under the necessity of evaluating her testimony that Mr. Long told her he had an accidental injury while changing a tire. They were not required to accept her testimony as conclusive proof that Mr. Long had such an accident. She certainly was an *interested* witness. It would be to her advantage to have the Commission believe her testimony in that respect. The Referee and the Commission had two bases upon which they might disbelieve it, (as they apparently did disbelieve it). (1) They might disbelieve that Mr. Long told his wife that he had such an accident; or (2) if they believed that she correctly quoted her husband's statement about an accident, they might have believed that he was incorrect in making such a statement.

There was no evidence from any other witness to corroborate Mrs. Long's testimony that her husband had an accident during the morning hours of Nov. 26, 1960. On the contrary, the testimony of all of the other witnesses was to effect that there was no evidence that any flat tire had been repaired or removed from the truck which Mr. Long drove that morning.

Applicant's attorney called Mr. Rodney M. Day as their first witness. (R. 13) Mr. Day was executive assist-

ant of the employer company; and he had signed the employer's report of injury, dated December 19, 1960, in which was reported an accident to Mr. Long at 8:30 A.M., Nov. 26, 1960, of "changing a flat tire," etc. (R. 1) Mr. Day testified that the applicant, Mrs. Long, was the one who told him that Mr. Long had such an accident, and she gave him that information after Mr. Long's death. (R. 16-17 and 19-20). Mr. Day had not talked with Mr. Long himself. Also Mr. Day testified that afterwards he made some investigation relating to whether there actually was a flat tire. All the information he could obtain was that there was no flat tire. (R. 18-19). This testimony was adduced by applicant's attorney in questioning Mr. Day as their witness.

Steve Mason, the truck driver who went to Cahone, Colorado and drove the truck from there to Cortez, testified he did not see any flat tire. The whole truck and trailer, including all of the tires, were practically brand new. They had been purchased new in August, 1960, just three months prior to that time. (R. 45-50).

Joseph Kirkham, adjuster for the State Insurance Fund, made a trip to Cahone and Cortez, Colorado during the month prior to the Industrial Commission's hearing. He talked with several people who had seen Mr. Long and conversed with him in the morning of the day he became sick, Nov. 26, 1960. (R. 40-43 and 51-55). Admittedly Mr. Kirkham's testimony in some respects was hearsay; but it served to explain and clarify some of the facts in issue. Each of the men who saw Mr. Long at Cahone about

8:00 A. M. on Nov. 26, 1960, told Mr. Kirkham that Mr. Long appeared to be sick and he said he was sick, but Mr. Long did not say anything to them about having an accident or changing a tire.

Section 35-1-88, U.C.A. 1953, reads:

> "The commission shall not be bound by the usual common law or statutory rules of evidence, or by any technical or formal rules of procedure, other than as herein provided; but may make its investigations in such manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out justly the spirit of this title."

Under this provision, the Supreme Court of Utah has held that the Industrial Commission may permit hearsay evidence to be given in a hearing, but that hearsay evidence alone will not support an award of compensation. *Spring Canyon Coal Co. vs Ind. Comm.*, 74 Utah 103, 277 Pac. 206; *Garfield Smelting Co. vs Ind. Comm.*, 53 Utah 133, 178 Pac. 57.

Later in the hearing, Mr. Day testified that the rules required each driver to make a report in his log sheet for the day, of every stop he made during his shift, which would include any stop for changing a tire. (R. 30-36). Mr. Long's log sheet for November 26, 1960, did not contain any entry or reference to changing a tire, even though it was written at the request of Mr. Long, by Mrs. Long in her handwriting. (R. 37-38). This is some indication of the fact that there was no such stop by him that day for the purpose of changing a tire.

It is now well settled that in an Industrial Commission case the burden of proof is upon the applicant to establish a claim for compensation. *Grasteit vs Ind. Comm.*, 76 Utah 487, 290 Pac. 764; *Wherritt vs Ind. Comm.*, 100 Utah 68, 110 P.2d 374, *General Mills, Inc. vs Ind. Comm.*, 101 Utah 214, 120 P.2d 379.

In the Industrial Commission's decision which is contained in its Order dated November 25, 1961, (R. 62), the Recommended Findings of Fact and Conclusions of Law of the Referee were adopted as the Findings and Conclusions of the Commission. The second and third paragraphs of the Referee's Recommended Findings, etc., (R. 63), read:

> "The Referee, having heard the testimony adduced by the parties and having considered the files and records attendant to the claim herein, finds that no competent evidence was presented to support the claim of applicant that the death of deceased resulted by accident arising out of or in the course of his employment with defendant, Western States Refining Company.
>
> Based on the foregoing finding, the Referee concludes that applicant's claim should be denied."

The language of the Referee may not have been the best way of saying it, but in substance it amounts to the same as:

> "The Referee finds that Mr. Long did not have a compensable accident resulting in his death."

In the case of *Thompson vs Ind. Comm.*, 82 Utah 247, 23 P.2d 930, the Supreme Court held that an Industrial

Commission finding that "the applicant failed to sustain his burden of proof by competent evidence that injury was the result of accident in course of his employment," was equivalent to finding that applicant did not sustain an injury by accident arising out of or in course of his employment.

If the applicant's testimony that her husband told her he had an accident while changing a tire, was not corroborated or supported by any other person or evidence, the Referee and the Commissin had good reason for disbelieving her testimony relating to that allegation, or to disbelieve the truthfulness of any such statement which may have been made by Mr. Long to his wife.

In the case of *Gagos vs Ind. Comm.*, 87 Utah 101, 48 P.2d 449, the Supreme Court's opinion contains the following:

> "The fact finder is not always required to believe the uncontradicted evidence of a witness, as will be seen from the text and the cases cited in support thereof in 23 C. J. p. 47, sec. 1791. There are a number of facts and circumstances in the instant case which may have caused the commission to disbelieve the testimony of Mr. Gagos. He was interested in the result of the controversy."

In the case of *White vs N. P. Mettome Company*, 2 Utah 2d 415, 275 P.2d 880, the Court's opinion contains the following at page 417:

> "The only evidence which even faintly implied that applicant could have reasonably ex-

> pected to be supported by decedent having come from applicant herself, and in view of the fact that no one else was present at the supposed conversations, and also in view of the fact that decendent was dead and could not be there to deny them, the Commission could reasonably disbelieve the applicant and find as it did. See *Smith vs Ind. Comm.*, 104 Utah 318, 140 P.2d 314."

In the case of *Smith vs Ind. Comm.*, 104 Utah 318, 140 P.2d 314, E. Wesley Smith, manager of the Continental Building, claimed that he suffered an inguinal hernia on March 18, 1942, when he slipped on a stairway and had to jump about six steps to the landing below. There were no witnesses to this. He did not report it to his employer or any doctor or lose any time from work. When he took a physical examination to join the Army on June 7, it was discovered that he had a hernia. He was operated on June 23. After a hearing, the Industrial Commission denied his application for compensation benefits. It was apparent from the wording of the Commission's decision that they did not believe the applicant's story as to the happening of the accident. The majority opinion of the Supreme Court sustained the Commission's decision. At page 323 of the Court's opinion is found the following language:

> "The weakness of plaintiff's case is that there is no evidence other than his own testimony that he had an accident, or the details or effects thereof, and he is an interested witness. By the nature of the accident it is impossible to contradict his testimoy. Such a situation presents an opportunity for imposition. A person who discovers he

has a hernia can readily make up details of a story which would prove that it was caused by an accident in the course of his employment. Under such circumstances he would naturally tell that it occurred while he was alone, he would describe the usual symptons when a hernia is caused and would make a plausible explanation of why he did not report it sooner. The person making such a fabrication can do so knowing that no one can directly contradict his testimony. Under these circumstances would it be unreasonable for the commission to refuse to believe his story?

"This question must be answered in the negative. Everyone recognizes that an interested witness is not entitled to as much credibility as one who is not interested.

"In *Norris vs Industrial Commission,* 90 Utah 256, 61 P.2d 413, 415, this court said:

"'But in order to reverse the commission * * * it must appear at least that (a) the evidence is uncontradicted and (b) there is nothing in the record which is intrinsically discrediting to the uncontradicting testimony and (c) that the uncontradicted evidence is not wholly that of interested witnesses *** and (d) the uncontradicted evidence is such as to carry a measure of conviction to the reasonable mind and sustain the burden of proof, and (e) precludes any other explanation or hypothesis as being more or equally as reasonable, and (f) there is nothing in the record which would indicate that the presence of the witnesses gave the commission such an advantage over the court in aid to its conclusions that the conclusions should for that reason not be disturbed.'

"This indicates that where the evidence is wholly that of an interested witness the trier of

> fact may reasonably refuse to believe it. Of course the fact that a witness is corroborated on one point does not require a trier of fact to believe him on other material points where there is no corroboration. In view of the fact that applicant was the only witness to testify to the accident, to the resulting sensations, and the further fact that these facts were by their very nature exclusively within his own knowledge and therefore could not be controverted by other testimony, the commission could reasonably refuse to believe his testimony, which they apparently did."

We do not understand why Plaintiff's attorney at page 8 of his brief, cited the cases of *Kelly vs. Ind. Comm.*, 80 Utah 73, 12 P.2d 1112; and *Kent vs Ind. Comm.*, 89 Utah 381, 57 P.2d 724; and *Ostler vs Ind. Comm.*, 84 Utah 428, 36 P2d 95; and *Wherritt v. Ind. Comm.*, 100 Utah 68, 110 P.2d 374; and *Woodburn v. Ind. Comm.*, 111 Utah 393, 181 P.2d 209. In each of those five cases the Supreme Court of Utah affirmed the decision of the Industrial Commission *denying* the applicant's claim for compensation benefits. In the *Kent* case, at 89 Utah 384-385, the Supreme Court's opinion contains the following:

> "When the Industrial Commission denies compensation and the case is brought to this court for review, a different type of search of the record is demanded than when the Industrial Commission makes an award of compensation and the record is likewise brought here for review.
>
> In the denial of compensation, the record must disclose that there is material, substantial, competent, uncontradicted evidence sufficient to

> make a disregard of it justify the conclusion, as a matter of law, that the Industrial Commission arbitrarily and capriciously disregarded the evidence or unreasonably refused to believe such evidence. * * * * *
>
> When we are asked to overturn the findings and conclusions of the commission denying compensation, it must be made clearly to appear that the commission acted wholly without cause in rejecting or in refusing to believe or give effect to the evidence. It was not intended by the Workmen's Compensation Act that this court, in matters of evidence, should to any extent substitute the judgment of the court upon factual matters for the judgment of the commission."

Our present case is quite dissimilar factually to the case of *Jones vs Cal. Packing Corp.,* 121 Utah 612, 244 P.2d 644, which was also cited at page 8 of Plaintiff's Brief, in which case the majority opinion of the Supreme Court held that the evidence required the Commission to award compensation.

In the *Woodburn* case, at 111 Utah 399, the Supreme Court's opinion quoted with approval from a previous Utah Supreme Court case, *Lorange vs Ind. Comm.,* 107 Utah 261, 153 P.2d 272:

> "Unless therefore it can be said, upon the whole record, that the commission clearly acted arbitrarily or capriciously in making its findings and decision, this court is powerless to interfere * * * It was not intended, * * * that this court, in matters of evidence, should to any extent substitite its judgment for the judgment of the commission."

In the *Wherritt* case, supra, the following syllabus briefly gives the reason for the Supreme Court's decision affirming the Industrial Commission's denial of compensation benefits:

> "Unless Court could say that conclusion of Commission on question of whether death occurred in course of employment was wrong because only opposite conclusion could be drawn from facts, it was bound to affirm decision."

And in the case of *Johnson vs Industrial Comm.*, 93 Utah 493, 73 P.2d 1308:

> "Unless Supreme Court can say that Commission acted arbitrarily, award must be sustained."

With respect to Mrs. Long's testimony that Mr. Long told her he had an accident on Nov. 26, 1960, Plaintiff's brief failed to mention the case of *Ogden Iron Works vs Ind. Comm.*, 102 Utah 492, 132 P.2d 376, which might have the appearance of being in their favor. The evidence in that case, however, was much stronger than was the evidence in the case at bar. In the Ogden Iron Works case, the widow of the deceased employee, Harold Parkinson, testified that when he came home from work the evening of March 24, 1941, he said he had a severe headache; and he also had a bump (lump) on his head. She asked him how he got it. He answered that he had cracked his head on his machine at work that day. Parkinson also made the same explanation to his doctor. A fellow employee also testified that while he was sitting at Parkinson's machine earlier that day Parkinson told

him to be careful when arising because Parkinson had given his head a dirty bump upon the levers of the machine that day. Parkinson died from the effects of a cerebral hemorrhage about two weeks later. The Supreme Court affirmed the Industrial Commission's award of compensation to the widow. The Court's opinion at page 502, said:

> "We are not prepared to say that the Commission could not, from these facts infer and find that the bump on the head was received while at work at the boring machine and that such bump caused the hemorrhage, from which the deceased died."

That language indicates that even with the evidence which there was in the record in that case, if the Industrial Commission had decided that the case was not compsensable, the Supreme Court would have sustained the Commission's denial of compensation.

POINT 2. THE INDUSTRIAL COMMISSION'S PROCEDURE OF NOT TAKING MEDICAL TESTIMONY AT THE HEARING WAS IN ACCORDANCE WITH LAW.

Section 35-1-77, U. C. A. 1953, as amended, commences:

> "Upon the filing of a claim for compensation for injury by accident, or for death, arising out of or in the course of employment, and where the employer or insurance carrier denies liability, the commission shall refer the medical aspects of the

case to a medical panel appointed by the commission," etc.

Under this provision, the Industrial Commission is required to refer medical questions to a medical panel. It must logically follow that the Commission is not supposed to go into the medical questions which may be involved in a controverted case unless and until such medical questions have been considered by a medical panel as provided by Section 35-1-77.

In our present case, it was first necessary to have a determination of the question whether Mr. Long actually had an industrial accident, (as applicant alleged he had). After the hearing was held and the evidence was taken regarding that question, the Referee and the Industrial Commission apparently were of the opinion that Mr. Long had not had an industrial accident. There being no accidental injury in the course of his employment, it was therefore not an industrial case. Consequently, there was no medical question for the Industrial Commission to refer to a medical panel.

It is now quite late for Mrs. Long's attorney to bring up for the first time, after the case has reached the Supreme Court, an objection relating to the Industrial Commission's action of excluding medical testimony at the Commission's hearing on October 16, 1961. The written Notice of the hearing, (R. 9), which was sent to Mrs. Long and the other parties, did not have anything typed on it about Medical testimony. Apparently after it was typed, someone wrote on the original notice which is

part of the Industrial Commission's office record, the handwritten notation, "No Medical."

At the commencement of the hearing on October 16, 1961, (R. 12), the Referee said to Mr. Larson, (who was applicant's attorney at that time):

> "Mr. Larson, if you'd like to proceed. There will be no medical testimony given at this hearing. We're not concerned with medical testimony, but with the particular facts involved in the case."

Mr. Larson then said:

> "I would assume then, Mr. Robison, that we don't need to touch on anything that has to do with the medical aspects, except as they might touch on his injury."

The Referee then said:

> "We're concerned here with whether the alleged injury occurred within the scope of employment of the deceased. Whether it would then come within the Workmen's Compensation Act."

Mr. Larson then said:

> "I'd like to call Mr. Day then."

Applicant's attorney did not make any objection to what the Referee had just said. He did not say they wanted to, or were prepared to, put on any evidence of a medical nature at that hearing. At no time thereafter did applicant or her attorney notify the Commission that they wanted to introduce any medical evidence to corroborate Mrs. Long's testimony that Mr. Long had the

accidental injury which she alleged he had on Nov. 26, 1960.

Now for the first time, at pages 13 & 14 of Plaintiff's Brief, Mrs. Long's present attorney objects to the Industrial Commission's procedure of "no medical testimony" at the hearing. He says:

> "If the blow to Mr. Long's stomach and chest took place as shown in the record, medical testimony *may have* further substantiated this fact."

Even at this point, Plaintiff's attorney has not specified any particular medical testimony which they have desired to, or could produce, to substantiate her testimony concerning an accident to Mr. Long.

The attending physician, Dr. James D. Hites of Dolores, Colorado, sent a report on a "SURGICAL REPORT" form of the Industrial Commission of Utah, dated 3-8-61. (Exhibit 2), (R. 59). This is one of the reports referred to by the Referee as being part of the Industrial Commission's record. (R. 42-44). Dr. Hites' letter dated Oct. 2, 1961, (Exhibit 3), R. 60-61), would also be in the same category, inasmuch as it modified and explained part of the material contained in Exhibit 2. Mrs. Long's attorney at the hearing, and her present attorney (at page 12 of his brief), were willing to have the Commission accept Dr. Hites' report on the Commission's form (Exhibit 2), but they did not want the Commission to accept Dr. Hites' explantory letter dated October 2, 1961, (Exhibit 3) as evidence, even though

both documents were signed by Dr. Hites. The Commission properly admitted both documents into evidence.

The particular parts of Dr. Hites' letter of October 2, 1961, which are of importance, are his explanation that the statement about the tire episode in his report of March 8, 1961, (Exhibit 2), was typed up by his secretary from information which Mrs. Long had given to said secretary over the telephone; and Dr. Hites' further remark that there was no mention made during Mr. Long's first ten days of hospitalization about the onset of his pain being associated with an accident. (R. 61).

Dr Hites is a resident and medical practitioner in the State of Colorado. As such, he was not under the jurisdiction of the Utah Workmen's Compensation Law with respect to making the report (Exhibit 2) to the Industrial Commission of Utah. If that report is admissable, then his supplemental report, which is his letter of Oct. 2, 1961, (Exhibit 3), is likewise admissable as evidence.

CONCLUSION

For the foregoing reasons, the decision and order of the Industrial Commission should be affirmed by this Court.

Respectfully submitted,

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